Supreme Court, U.S.
FILED

No. 04-459 OCT 1 - 2004

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# In The

# Supreme Court of the United States

**RODNEY ALAN MATTMILLER,**

***Petitioner,***

**v.**

**STATE OF MINNESOTA,**

***Respondent.***

**On Petition For Writ of Certiorari to the Court of Appeals for the State of Minnesota**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

1) Whether federal law, 49 U.S.C. § 40116(f), preempts Minnesota from filing felony charges relating to the imposition of its tax laws against a person present there because of his employment as a commercial airline pilot and flight instructor, and while he was also serving as a high-ranking Officer of the United States Air Force Reserve, stationed outside Minnesota.

2) Whether 49 U.S.C. § 40116(f) itself, or principles of comity and state abstention, procedurally required that Minnesota proceed against Mattmiller in a manner calculated to be the least intrusive upon the federal interests concerned.

3) Whether federal Due Process allows Minnesota in a criminal proceeding to present in general verdict form conflicting theories of either his being a domiciled Minnesota resident (intentional evasion) or his being a non-domiciled resident present in Minnesota for more than half the year (inadvertence) and in not requiring a unanimous verdict on one or the other.

4) Whether Minnesota law concerning a "domiciled resident" is so impermissibly vague and indefinite that it denies Due Process guarantees.

5) Whether Minnesota denied Due Process guarantees of a criminal defendant by instructing the Jury, and allowing written substantive evidence to the Jury, that he bore the affirmative duty to maintain and produce records sufficient to prove that he was not a resident, thereby impermissibly shifting the burden of proof.

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## PETITION FOR WRIT OF CERTIORAI TO THE UNITED STATES SUPREME COURT

Mr. Rodney Alan Mattmiller respectfully requests that the Honorable Justices of the Supreme Court grant a Writ of Certiorari to review the judgment of the Court of Appeals for the State of Minnesota rendered on June 15, 2004. In support of his request, Mr. Mattmiller sets forth the following:

## OPINIONS BELOW

The opinion of the Minnesota Court of Appeals in State v. Mattmiller (not published) is the subject of this matter. It is at Appendix A. The Supreme Court of Minnesota denied Discretionary Review on August 17, 2004. It is at Appendix B.

## STATEMENT OF BASIS FOR JURISDICTION

Opinion of the Minnesota Court of Appeals affirming Mattmillers's conviction was entered June 15, 2004. On August 17, 2004, the Supreme Court of Minnesota refused review. Jurisdiction to review the decision of the Minnesota Court of Appeals is granted by 28 U.S.C. § 1257(a).

## CONSTITUTIONAL PROVISIONS

Article VI: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

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## STATEMENT OF THE CASE

### A. Basis for Federal Review in the First Instance.

The issue is raised whether federal law preempts Minnesota taxation of Mattmiller while based in Minnesota as a pilot employed by Northwest Airlines, Inc. and regularly employed as a Lieutenant Colonel in the Air Force Reserve stationed in Washington. The issue is also raised that Minnesota, in light of the federal statute and as a matter of comity, was obligated to pursue a remedy which would be non-intrusive to federal interests. Mattmiller was convicted in a Minnesota district court and his case has timely proceeded through the appellate courts of Minnesota established to hear such appeals.

### B. Procedural History.

Mattmiller was charged by Minnesota with filing fraudulent state returns, evading income taxes, and evading motor-vehicle taxes on the alternative theories that he sought to avoid Minnesota taxation by claiming to be a domiciliary of Washington or that he was a domiciliary of Washington residing in Minnesota more than 183 days maintaining an abode there. He defended that federal law preempted the state from imposing such taxes. A jury returned a

verdict of guilty on three years (1998, 1999, 2000) and not guilty on two (1996, 1997). Sentence was imposed. The Minnesota Court of Appeals denied relief. The Supreme Court of Minnesota denied review. He now seeks a Writ of Certiorari.

### C. Statement of Material Facts.

Mattmiller was a pilot and flight instructor for Northwest Airlines. He was also a Lieutenant Colonel in the United States Air Force Reserve stationed in the State of Washington, where he claimed residence.

Mattmiller claimed no knowledge of tax laws. His hired his returns prepared by a Minnesota CPA to whom he supplied full information. He believed he was and remained a resident of Washington. Based upon the expert opinion given to him by his CPA he consistently filed his income tax returns as a non-resident of Minnesota.

Mattmiller's employment records at Northwest showed him to be a resident of Washington. Prior to initiating criminal charges, Mattmiller was never contacted by the Minnesota Department of Revenue, the means for which Minnesota had a standard letter (Exh 1) (T 1794). He never received any sort of residency questionnaire or Residency Fact Sheet for which Minnesota had a standard form (Exh 1) (T 1463; 1794). Minnesota made no challenge concerning his employment records, administratively or otherwise. No prior attempt was made to obtain a civil resolution of matters first placed in issue in these criminal proceedings.

Mattmiller grew up in Illinois and won a ROTC scholarship to the University of Southern Illinois. He was commissioned a Second Lieutenant in the United States Air Force. He was assigned to McChord Air Force Base near Seattle. In September of 1985 he resigned his Captain's Commission to become a pilot for Northwest Airlines, Inc. Shortly thereafter, he accepted a commission in the Air Force Reserve and was again stationed at

McChord. Before 1992, NWA had Mattmiller based in Seattle, Detroit, Minneapolis, Boston and New York.

Due to his nomadic pilot's lifestyle Mattmiller maintained several residences. While in Washington he lived in a home which he co-owned until 1988, a condominium which he co-rented until 1993, and two other homes which he shared from 1993 until 2000. In 2000 he transferred to Scott Air Fore Base in Illinois. He married in 1993. He stayed with his wife at her home in Fridley, Minnesota, until 1997, when he had renovated for residential use a vacation cabin he owned at Hastings, Minnesota. Because he was rarely at one place for any significant period, he required a centralized mail delivery location. From 1988 to 2000 he rented a U. S. Post Office box in Seattle, which required he personally pick up his mail. He was transferred by the Air Force Reserve to Illinois in February 2000, at which time he rented a box at Normandy Park in Washington State.

Mattmiller was a Reserve Officer stationed and regularly employed in Washington. He voted in Washington. His only professional license was issued in Washington. After their marriage, he and his wife shared a checking account but with two checkbooks – one with her address in Minnesota and his with his address in Washington. During the times material he had many addresses – some inside Minnesota. Except for the ten months of 2000, he personally picked up his mail in Seattle. He carried a Washington driver's license. He owned and maintained an automobile licensed and located in Washington for his use there. Because emission inspections were required yearly in Washington, one vehicle located in Minnesota was registered in Oregon (for which he encountered some difficulty).

Criminal charges were brought under Minn. Stat. § 289A.63. Issues here concern Minn. Stat. § 290.01 Subd. 7 regarding the Minnesota definition of "resident" and its implementing Rule, 8001.0300, and the refusal of Minnesota Courts to find such state law was preempted by 49 U.S.C. § 40116.

He was charged with five counts of filing false or fraudulent tax returns, five counts of attempting to evade or defeat the state's tax laws for the years 1996 through 2000 (inclusive) and two counts of attempting to evade Minnesota Sales Tax on a vehicle under Minn. Stat. § 297B.10.

Minnesota Rule 8001.0300 went to the Jury as Exhibit 118. It recites as "presumptions" several propositions which conflict with § 40116. Subpart 1, A & B. defines the term "resident" as "any individual person who is domiciled in Minnesota". The Rule lists 26 factors to be considered in determining whether one is domiciled in Minnesota. The Court then instructed on 27 factors, adding as the very first factor where someone's family is domiciled. The Minnesota Court of Appeals found, *inter alia*, that "...there is adequate evidence to suggest that appellant is domiciled in Minnesota because his family is in Minnesota, which creates a presumption that appellant is also domiciled in Minnesota. App p 11. Minn. R. 8001.0300, subp 2 ...." Reciting the Minnesota factors relating to residency [Paragraph X in the Instructions] reads:

> "W. percentage of time (not counting hours of employment) that the person is physically present in Minnesota and the percentage of time (not counting hours of employment) that the person is physically present in each jurisdiction other than Minnesota."

In applying the 183-Day theory, the Jury was instructed "... a person shall be treated as present in Minnesota on any day if the person is physically present in Minnesota at any time during the day...." ( Inst Definitions). This contradicts § 40116.

The State's theories were in the alternative. One was that Mattmiller was a Minnesota domiciliary. The other was that he was a domiciliary of Washington who owned an abode in Minnesota and who had spent 183 days or more there. Each Juror was allowed to find guilt under either theory.

To show that Mattmiller was in the State 183 days or more the State called a paralegal who had prepared calendars on which she had marked days present in the State. [Exh. 188-192] To achieve the 183 days she included partial days that he was in the State solely as a pilot for Northwest, i.e., days in which he flew into or out of Minnesota on a scheduled flight. She also showed Mattmiller present on other days when he actually was not, because she did not understand the difference between universal military time known as "Zulu time" and Minnesota time. Mattmiller was employed as a flight instructor the last five months of 1997 and the first three months of 1998. To show him present more than 183 days in 2000, the State included days that he was in Minnesota as a flight instructor.

On January 3, 1996, John Haugen, an attorney representing the Minnesota Department of Revenue, sent a letter to Northwest Airlines. That letter represented that non-resident pilots were not subject to taxation when they are present in Minnesota for their duties as flight instructors. App p 37.

Mattmiller asserted that the federal statute shields his income earned while a pilot flying into, out of, or over a state, and that Minnesota could not count those days to show his presence based upon his being a non-domiciled resident.

In instructing the Jury, the Court applied law that is in conflict with federal law. While acting as a pilot, Mattmiller was entitled to a modified application of Minnesota law. Because the Jury was permitted to apply either theory including the one applying the incorrect counting of days spent in Minnesota, he was prejudiced.

Mattmiller was also charged with failure to pay Minnesota sale tax on a motor vehicle. Minnesota law exempts non-residents from this tax. Minn. Stat. 297A.67, subd. 30, *citing* 297B.03(2). Therefore, the issue relating to this was the same as that concerning the income tax counts – that the State must prove that Mattmiller was a resident of Minnesota. It is coterminous with other counts and subject to the same arguments on residence.

Several matters disparaging to his character were introduced by the State. In large part the Minnesota Court of Appeals found that each should not have been introduced or were introduced for reasons other than the purpose given. However, it refused to recognize prejudice and allowed them to stand. An accusation which he found to be particularly irksome was that he had submitted fraudulent travel vouchers to the Air Force. This was a claim made by the State of Minnesota and not the Air Force. (The Air Force had audited them and found them correct). It was a false state claim reflecting a total lack of knowledge of the industry practices of "deadheading", "positioning" and use of the "jump seat". This misunderstanding and the resulting false state accusations to the Jury lend much support to the intent of Congress that this area be federally preempted.

Minnesota repeatedly invoked presumptions. Such claimed presumptions are not permissible concerning airline employees because they are repugnant to § 40116.

## REASONS FOR GRANTING THE WRIT OF CERTIORARI

### REASON I

**IN REVIEWING A STATE FELONY CONVICTION THE MINNESOTA COURT OF APPEALS HAS DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY WHICH CONFLICTS WITH 49 U.S.C. § 40116(f) WHICH PREEMPTIVELY RESTRICTS THE MANNER IN WHICH THE COMPENSATION OF INTERSTATE AIRLINE EMPLOYEES MAY BE TAXED.**

This was raised in a pre-trial Motion In Limine claiming the preemptive effect of 49 U.S.C. §40116. This was denied. App p 3. A Jury Instruction taking into account the strictures of 49 U.S.C. §40116 was requested. This also was denied. Also, App p 12.

**A. The federal statute expressly addresses tax treatment by the States of airline employee pay.**

49 U.S.C. § 40116 is entitled "**State Taxation**". App. p 16. Subsection (f)(2) speaks directly to state taxation of air carrier employees. It provides that the pay of an employee having regularly assigned duties on aircraft in at least 2 states is subject to the income tax laws of *only* the State of residence or in which the employee earns more than 50 percent of the pay received.

**B. Federal regulation of air space and air transportation is pervasive, far-reaching and exclusive.**

Congress enacted the Federal Aviation Act, 49 U.S.C. §§ 40101 et seq., to develop a regulatory system to provide for the needs of (A) the commerce of the United States, (B) the United States Postal Service; and (C) the national defense. § 40101(a)(7); § 40102(a)(37)(E).

This is a complex industry. A uniform and exclusive paradigm of federal regulation is created by the Act. The functions of civil transportation and national defense intertwine. The same airspace is used by both and has been federally preempted. The same air facilities are shared and have been federally preempted. A "public aircraft" includes "[a]n aircraft owned or operated by the armed forces or chartered to provide transportation to the armed forces...." 49 U.S.C. §40102(a)(37)(E). The respective roles of flight personnel may vary with the mission they are flying. A pilot normally flying a private commercial aircraft may suddenly fly the same aircraft as a "public aircraft" transporting supplies or troops in national defense. A pilot may one day be flying a commercial aircraft. The next day he may be flying a military aircraft. A pilot, such as Mattmiller, is invaluable to the military when in his capacity as Lieutenant Colonel he brings his expertise derived in his civilian capacity to his military role. It is invaluable when he uses his civilly-accumulated knowledge to direct military aircraft into airports around the globe or in and out of war zones.

As relates to national defense, it is exclusively federal. As involved in mail delivery, it is exclusively federal. Pilot functioning is exclusively federal. Control of pilot training is federal. Pilot training is federal. 49 U.S.C. § 40111(3); See also, 49 U.S.C. § 42112 (pilot compensation).

In a totally different context, this Court has found that a major purpose in passing the Act was to provide assurance to the carrier that its investment in operations will be protected as is reasonably possible. Civil Aeronautics Board v. Delta Airlines, Inc., 367 U.S. 316 (1961). That same underlying reasoning applies to the Air Force concerning its investments, including in training its officers.

Virtually all activities relating to the industry are exclusively federal. Even airline records are involved. 49 U.S.C. § 40115. To escape the broad scope of federal pervasiveness one must *affirmatively* seek exemption from it. 49 U.S.C. § 40109.

Those working in commerce and in national defense are *personally* within the federal jurisdiction. Choices in their personal lives are implicated. Because of the nature of their employment, like those in the armed forces, they are required to work and reside in multiple places. They may call one state "home", be based in another, fly into, out of and over several others.

Congress found that transportation employees were being *personally* subjected to multiple-State claims for withholding and taxation. Testimony showed claims sometimes aggregated to more than earnings. Pilots and others *were being interfered with in their personal* lives *to the extent that it was directly interfering with the industry itself*, thus the necessity for enactment of the legislation.

**C. The legislative history is clear that Congress intended to limit State taxing capabilities.**

The Legislative History for the Senate is found at P.L. 91-569, 1970 U.S.C.C. A.N. 5039 (1970). Congress found, ". . . commerce is *unreasonably burdened* by certain income taxation policies of

some states insofar as such policies affect interstate carrier employee's income." (Emphasis added). The Committee noted that 38 states impose a personal income tax upon individuals and that 31 of those states require withholding concerning residents and nonresidents. Id. at 5041.

The Committee concluded that legislation in this area would be incomplete if it did not address the problem of multiple state tax liability along with the problem of multi-state withholding and/or reporting for taxation purposes. See, Id. at 5041.

> "The Committee Bill reserves to the individual states the present practice of taxing substantial compensation which is earned by a non-resident. However, it would limit that practice in accordance with the recommendation of the multi-state commission to states wherein more than 50 percent of the nonresident interstate carrier employee's compensation is earned. The Bill does not eliminate entirely the problem of double taxation although it does reduce the number of states which may assert the right to tax compensation paid to employees of interstate carriers to two." Id. at 5043.

The legislative history makes clear that state interference of exactly this kind is what was addressed by the legislation. The Senate Report accompanying the Bill plainly states the legislative intent – *to limit a state's taxing authority over the income of pilots to two carefully circumscribed States*: (1) The State of the pilot's residence; and, (2) The State in which the pilot *earns* greater than 50% of his income measured by scheduled flight time. Congress clearly intended that no other state have taxing authority.

The intent of Congress was to preclude a state such as Minnesota from taxing an individual such as Mattmiller unless Minnesota was his residence or he flew more than 50% of his scheduled flight time within its borders. Congress *left no room* for a third taxing state, a state where a pilot has an abode and is present more than 50% of his time if such time is reached only by

adding time flying into, out of or over the State. Congress clearly correlated a prospective taxing state's interests to "scheduled flight time" and *not mere presence*.

Subsection (f) must be read in conjunction with another federal statute in whose light it was enacted, Income Taxation – Carriers Act, Public Law 91-569, 84 Stat. 1499, . § 4(a) [§ 112(a)]. That Act provided that state of residence of a transportation employee is to be determined by the "employee's residence, *as shown on the employment records of any such carrier*". (Emphasis supplied). App p 20.

49 U.S.C. §40116(f)(2)(A) mandates that an employee of an interstate air carrier having regularly assigned duties on aircraft in at least two states is subject to the income tax laws of only the State of residence. That State of residence referred to in subsection (A) is confined to what is shown on the records of the employer carrier. The proper recourse of a State that wishes to challenge such records is to initiate a civil action in regard to such records.

**D. Violation of Section 40116 is a federal crime.**

49 U.S.C. § 46301 imposes *civil* penalties for the violation of parts of the Act and places jurisdiction with the Administrator. However, that section specifically excludes § 40116. 49 U.S.C. §46316(a) provides a general *criminal* penalty for persons violating.§ 40101 et seq. making them subject to a fine under Title 18. Subsection (b) provides that subsection (a) shall not apply to §40101 et seq., except ...40116.... App p 18.

**E. Prior to this prosecution Minnesota had publicly held out a contrary position.**

On January 3, 1996, the Minnesota Department of Revenue acting through John Haugen, its attorney, sent a letter to Northwest Airlines. That letter *expressly excluded non-resident pilots from income taxation when they are present in Minnesota for their duties as flight instructors*. App p 37.

Without first exhausting civil remedies, and in fact acting contrary to the announced official position of non-taxation by the Department of Revenue, State officials leapt to initiate criminal felony charges. Mattmiller was forced to defend in a forum where discovery and other civil trial aids are denied. He was forced to face such charges knowing that an adverse decision would remove him from the industry in which he had devoted his working lifetime and knowing that it would end his military career as a Lieutenant Colonel in the United States Air Force Reserve.

**F. Minnesota's application of its Rule against Mattmiller is in direct conflict with preemptive federal laws.**

Mattmiller was tried upon two separate and independent theories: (1) that he was a non-domiciliary who spent more than 182 days in Minnesota in any given year ("183-Day Theory"), and (2) that he was an actual resident of Minnesota ("Actual Resident Theory") [Jury Inst. At 7]. In applying the 183-Day theory the Jury was instructed to count all days during which Mattmiller was present in Minnesota *at any time*. [Jury Inst. at 10]. This particular instruction, and thus the 183-Day theory which it incorporates, conflicts directly and is preempted by 49 U.S.C. § 40116.

Congress possesses the authority to preempt state law. Crosby v. National Foreign Trade Council, 530 U.S. 363, 372 (2000). Direct conflict preemption renders invalid any state law that conflicts with federal law. It arises when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Hines v. Davidowitz, 312 U.S. 52, 67 (1941). With regard to express preemption, identification of the domain so preempted is key to the task of ascertaining the scope of the preemption. Cipollone v. Liggett Group, Inc., 505 U.S. 504, 517 (1992). Important aspects of this inquiry are the *plain language* of the preempting statute and the *purpose of Congress* in enacting the statute. The "purpose of Congress" is the ultimate touchstone" in ascertaining express preemption. Retail Clerks Int'l Ass'n Local 1625 v. Schermerhorn, 375 U.S. 96, 103 (1963). Both

Congress's purpose and the plain language of 49 U.S.C. § 40116 clearly indicate its preemptive effect on the Minnesota income tax laws as applied to airline pilots.

The 183-Day Theory [**nonresident**] was employed by the State and included in the Jury Instructions as an alternative theory to the Actual Resident Theory [**resident**]. The plain language of § 40116(f) states that with regard to a ***nonresident*** airline pilot "having regular assigned duties on aircraft in at least 2 states," a state may require the pilot to pay income taxes ***only if*** that pilot "earns more than 50 per cent of the pay received . . .from the carrier" within the taxing state. To do so, "the *scheduled flight time* of the [pilot] in the State ...[must be] more than 50 per sent of the total scheduled flight time of the employee when employed during the calendar year." § 40116(f) (Emphasis added).

§ 40116(f) is clear. It preempts the 183-Day Theory insofar as it relies upon Minn. R. 8001.0300, subp. 1.B [App p 25], which incorporates subp. 4 (counting *partial* days in-state as whole days) concerning the income of an air carrier employee. Federal law mandates that *only* the employee's "scheduled flight time" can be considered concerning **nonresident** employees. The legislative history of § 40116 confirms its preemptive intent and effect.

Congress found that "interstate commerce is unreasonably burdened by certain income taxation policies of some states insofar as such policies affect interstate carrier employee's income. P.L. 91-569, 1970 U.S.CC. A.N. (1970) at 5039. The record reveals the Senate Commerce Committee's intent to limit the number of states that could tax an interstate carrier employee's income. *Id.*at 5042.

Mattmiller's duties as an international pilot took him all over the globe. The 50 per cent threshold could not be met. Under the federal statute Minnesota could not implement a *third* rule. Only if the pilot resides in the state or if his "scheduled flight time" within the state is greater than 50%, does the state has taxing authority. If not, taxing authority is prohibited. Under the federal statute,

Mattmiller's presence in any state, other than the state in which he resides, does not permit that state to tax his income unless his *scheduled flight time* there is greater than 50%. The Minnesota Rule, by its terms, provides that *any presence, even work-occasioned,* on the part of Mattmiller – for *any part of a day* – constitutes a full day spent in Minnesota. This violates the clear mandate of the federal statute. [Compare: Minn. Rule, subp. 4; [App p 30] with 49 U.S.C. § 40116(f)(2). App p 16].

In determining the "state of residence" of a pilot, we must look to Income Taxation – Carriers Act, Public Law 91-569, 84 Stat. 1499, § 1112(a). That act provides that the state of residence of a transportation employee is to be determined by the "employee's residence, as shown on the employment records of any such carrier".

Minnesota relied upon presumptions not permissible under § 40116. The Instructions to the Jury did not indicate such indicia *as presumptions*, but allowed the Jury to "infer" them. A document entitled "Minnesota Residence" concerning pilots did go to the Jury as Exhibit 112. In its Brief to the Court of Appeals (p. 14) the State recited multiple statements which it found in Exhibit 112. Among those recited:

> a. The place where one's family resides is generally considered one's residence;
> b. The place of employment is a major factor in determining residence;
> c. If a home is maintained in the state of employment, it is the usual residence;
> d. The number of days spent in each place is relevant;
> e. A reserve pilot who must be available on short notice will find it impossible to establish a residence other than where he flies from.

Also in evidence as Exhibit 118 was Minn. R. 8001.0300. That Rule recites controlling presumptions. On appeal, the Court of Appeals cited such presumptions with approval. App p 11.

Minnesota's Rule 8001.0300 describes, and relies upon, what is the *usual circumstance.* Congress in legislating § 40116 recognized that, because of the nature of their duties, airline employees *are not within that usual circumstance.* Because of that, it enacted § 40116 *to address their specific situation.* When Minnesota applies its general Rule concerning the usual circumstance to pilots' specific circumstances, such State Rule and the Federal Statute clash. The usual Minnesota presumptions are repugnant to 49 U.S.C. § 40116 if applied to an airline employee.

In his Reply Brief in the Court of Appeals, Mattmiller's Appellate Counsel stated that, "Had the State pursued Mattmiller and won a guilty verdict under its Actual Resident Theory only, federal preemption would not be an issue." [Reply Br p 11] Mattmiller, here, would assert that counsel there was giving up too much. Under that Theory, federal preemption would still impose prohibitions upon Minnesota's use of its Rule 8001.0300. Minnesota's usual indicia and presumptions could not be applied. To the contrary, the only presumption allowable would be that Mattmiller's employer records accurately reflected where he was resident, and which Minnesota would have to honor.

Minnesota's application of its 183-Day theory to Mattmiller was repugnant to § 40116. As addressed elsewhere, submission of the two theories in a general verdict form also vitiates the verdict.

**G. The application of the Minnesota law here thwarts and is a direct interference with the federal mission.**

The Minnesota law, as applied to Mattmiller, created an obstacle to federal goals and purposes. That interference is *much magnified* when contemplating its *detrimental effect* upon the federal mission

An examination of the Act discloses how much the national interests of defense and civil commerce are involved. The same air facilities are used. The same airspace is used. Sometimes the same aircraft is involved. One day a craft may be used for civil transport. The next day it might be chartered to fly troops. The same pilot may be flying it both days. The Secretary of Commerce and the Secretary of Defense share roles under the Act.

Knowledge of the industry shows the synergism between Mattmiller's dual roles of civil commercial airline pilot and high-ranking military officer charged with the routing of virtually all military aircraft in his zone of command. His knowledge gained in the civil capacity enabled and fostered his function in the military capacity. Intricate knowledge of airports around the globe and conditions indigenous to each is vital in his capacity of military command ordering military craft to locations for landing, fueling, boarding etc. Likewise, knowledge gained in his military capacity is invaluable to him flying in his civilian role.

When tried, not only was Mattmiller a civilian pilot flying commercial aircraft and at times instructing other pilots, he was also a Field Grade Officer in the U.S. Air Force Reserve. As a commissioned officer with the rank of Lieutenant Colonel, he acted as an Officer of the United States. His security clearance was "Top Secret". At times he flew military aircraft. Mostly he directed operations of all military aircraft in his command.

Mattmiller's military involvement was known at trial. Minnesota was well aware that by virtue of federal regulation concerning terrorism, pilots *may not fly commercial aircraft if convicted of a felony*. Because of this, Mattmiller would be banned for his lifetime from flying commercial aircraft or training other pilots. His status as an Officer in the United States Air Force Reserve would also be ended. The State brought in military per diem and travel vouchers. [Exh 177]. Because the State did not understand the functioning and interrelations of the civilian and military roles it falsely accused him to the Jury of having made

fraudulent claims for military travel pay. (Not a claim made by the military which had already audited and approved them.) The State totally disregarded the federal military career it was terminating. It did not consider the following excerpts from a recent Field Grade Officer Performance Report for Mattmiller.

UNIT MISSION DESCRIPTION
Single manager for executing Global Reach – airlift, air-refueling, special operations, aeromedical evacuation, operational support, and Presidential airlift in support of national goals and objectives. Integrates Total Force to implement directives/taskings from government agencies for movement of national and international resources in response to wartime needs, contingencies, exercises, and humanitarian relief efforts.

JOB DESCRIPTION
Duty Title: MAJCOM Deputy Director of Operations

KEY DUTIES AND RESPONSIBILITIES:
Deputy Director and command focal point for the largest air transportation system in the world. Supervises the daily execution of AMC's worldwide missions throughout the ... regional operational area of responsibility. Manages assets including more than 1,250 active duty and air reserve component aircraft: C-5, C-9, C-17, C-21, C-141, C-130, KC-10, KC-135, and contract commercial aircraft. Directly supports the Director of Operations interface with USTRANSCOM, NMCC, State Department and the White House. Key decision maker for operations, logistics, and transportation issues affecting 150 missions per day. Supervises 17 officer mission directors and 40 enlisted mission managers.

IMPACT ON MISSION ACCOMPLISHMENT:
– Directed execution of largest AEF movement on record; 65 airlift msns moving 4,000 troops/2.5K cargo

– Expertly led response to MC-130 crash in …; delivered medical team to site within 6 hours.
Orchestrated critical C2 for … movement from … to …; actively managed alert crews at stage bases; coord'd C-17, C-141, KC-135 acft movements – ensured early arrival
– Meticulously worked recovery of C-17 broke in …; gained waiver to fly with landing gear down
– Instrumental in safely moving radiological-biological waste materials out of … hospital to a US facility
Rescued msn delayed enroute w/6 high-priority CH-47 helicopters; timely delivered enabled combat ops
– Established and maintained continuous C-5 stage ops in …; allowed unprecedented high velocity ops
– Smoothly executed Op SOUTHERN WATCH missions when theater went to FP-DELTA; assets protected

RATER GENERAL OVERALL ASSESSMENT:
Delivers excellence in dynamic TACC arena; innate decision-making skills crucial to AMC global success
– Swiftly orchestrated urgent aeromedical evacuation out of …; combat troops received timely care
– No notice; rerouted aircraft to …, to transport heart attack victim—treatment saved life
– Brilliantly managed Patriot Express msn diverted by ATC for security; alleviated fears; kept msn moving
– Masterfully tracked airlift missions to meet slot times into classified Op ENDURING FREEDOM airbases
– Closely controlled DV support msns into combat areas including SECDEF, CJCS, and USCENTCOM/CC
– Exceptional leadership; redirected msns due to volcano eruption on Sicily; all AMC assets safely moved
– Advocate for TACC Reserve issues; developed solutions for IMAs to get approval for short-notice billeting
– Tremendous positive impact in demanding AMC domain

The legislative history of the federal Act demonstrates that potential multiple claims, ***civil*** in nature, made by various States imposed an undue burden on the industry and those employed in it. Congress deemed it necessary to constrain those ***civil*** interferences. If Congress deemed those ***civil*** claims to constitute an undue burden, then the commencement of ***criminal*** proceedings with the resulting ***removal*** of those pilots from ***the industry itself*** must be deemed outrageous. When such criminal proceeding are cavalierly initiated without prior civil determination and with the knowledge that it will remove Officers of the United States from their official duties, then such State actions become a direct interference with federal interests including national defense.

Prosecution of State felonies *calculated* ***to remove*** pilots and flight instructors from their employment for the ***purpose of coercing others with fear*** into immediate withholding and reporting of asserted taxes is a direct interference with federal interests. It is a prohibited encroachment. It is aggravated by the State's failure to provide any prior notice. It is more so when such actions are *undertaken in the face of previous official representations to the contrary.* It becomes outrageous when there is no meaningful opportunity afforded to first hear and exhaust such issues utilizing those civil means *usually afforded to others*.

The Soldier's and Sailor's Relief Act of 1940, as amended, 50 U.S.C. App. § 574, [Since P.L. 108-189 signed Dec. 12, 2003, the Servicemenbers Relief Act 50 U.S.C. App § 571] does not apply to civilian commercial airline personnel. It applies to full time regular military personnel. It appears to not embrace those in the Military Reserve. § 40116 was enacted by Congress to provide some minimal protections of comparable nature to airline personnel as it relates to state claims of taxation.

Until brought to trial here Mattmiller had an illustrious military career. His Performance Report is brought to an abrupt halt with the following words, "judgment flawed – convicted of state tax evasion". In response to that he asks four questions. First,

what was the flaw in his judgment? After all, he had relied upon the advice of a professional expert on Minnesota taxation. Secondly, was this not the exact kind of interference that Congress intended to remove with its enactment of § 40116? Third, how can Minnesota ignore that he had regular gainful employment outside Minnesota as a Reserve Officer? Fourth, should not these questions have been first addressed civilly in a manner that would not have destroyed his civil and military career?

**H. Federal law creates a sphere of personal activities for airline employees which the application of the Minnesota Rule encroaches.**

Mattmiller submits that superior federal law creates a sphere or zone of federally-protected activity, privilege, immunity or exemption for the industry, those in the industry, and him personally in his private life, intended to protect him from certain state encroachments. That includes distinct federal limitations on claims for certain state taxes, and especially in the means and manner adopted by Minnesota.

Federal law guarantees to him certain personal choices as to where his "home" is and concerning his personal residence for purposes of taxation, voting, driver's license, etc., similar to those created by the Soldier's and Sailor's Relief Act, Id. It guarantees a freedom from arbitrary and capricious State criminal accusation, made without any prior notice or attempt at civil resolution.

In preserving those personal choices, that federal guarantee supercedes any ability claimed by the State to make those choices for him or to usurp them from him.

**I. The Minnesota Courts reflected bias.**

The Court of Appeals relied upon its decision in Minnesota v. Enyeart, 676 N.W.2d 323. (2004). There it alluded to Minnesota's "legitimate interest" in taxing a pilot present, "enjoying the services and protection the state affords." This reflects a bias that

Mattmiller also experienced in the press and the Minnesota courts. They represent pilots present as persons who are abusing Minnesota by having residence in states which do not have income taxes. Prosecutors were quoted as targeting pilots from states having no income taxes, who were portrayed as shirkers. What those critics conceal is that those states merely utilize means *other than* taxes on *income* to support their governments.

Minnesota is required to pro rate income taxes with other states by allowing credits for income taxes paid them. It allows *none* for *other taxes paid*. Minnesota's claims upon such pilots should be more correctly viewed as unequally and unfairly doubling their tax burdens. Because there is no foreign income tax credit it must honor, Minnesota claims to unfairly usurp for itself *all* those taxes *upon income* which those states *could have imposed* had they opted to use that method of taxation but chose not to. In effect Minnesota is saying, "They don't tax it. Somebody needs to!" So far it has only targeted states having zero income taxes. Because of its high rates, it may also target pilots from other states with lower rates seeking the differential. By targeting pilots residing in states with no, or lesser, income taxes it is Minnesota, not the pilots, that schemes for unjust enrichment. This prosecution was calculated to foster that scheme.

**J. Application of the Minnesota law and Rule was both relevant to his conviction and highly prejudicial.**

Application of the Minnesota law to Mattmiller as inappropriately embodied in the instructions and exhibits to the Jury prejudiced him.. As this Court stated in Francis v. Franklin, 471 U.S 307, 324 (1985) ". . .where there exists a reasonable possibility that the jury relied upon an unconstitutional understanding of the law in reaching a guilty verdict, that verdict must be set aside." Here, error was a certain result.

## REASON II

**IN REVIEWING A STATE FELONY CONVICTION THE MINNESOTA COURT OF APPEALS HAS INCORRECTLY DECIDED AN IMPORTANT FEDERAL QUESTION BY FAILING TO REQUIRE THAT MINNESOTA MUST, BECAUSE OF SECTION 40116, OR AS A MATTER OF COMITY AND STATE ABSTENTION, PROCEED IN A MANNER CALCULATED TO BE THE LEAST INTRUSIVE UPON FEDERAL INTERESTS CONCERNED.**

Exhibit 1 was introduced to show procedures for civil resolution were readily available and commonly used.

**A. Section 40116 Imposes a Procedural Duty That Minnesota Go Forward in a Manner Calculated to be the Least Intrusive Upon the Federal Interests.**

In Reason I, Mattmiller urges that the clash between the Federal Statute and the State Rule is one of federal preemption, which he perceives works a *substantive* result that the state rule is void to the extent it is in conflict. However, even if § 40116 is not *substantively* in "irreconcilable conflict" with Minnesota law, as viewed by the Minnesota Court of Appeals [App p 12], that federal statute still posts *procedural* impositions binding upon Minnesota officials

In the usual instance, officials of a State possess the option, exclusively theirs, concerning whether to proceed civilly or criminally. However, exercise of that option is tempered when, as here, the interests of the state and federal sovereignties collide.

Relative to Minnesota's claimed right to tax pilot income, Minnesota officials had two courses available. *Either would equally satisfy the State's needs*. One (civil determination) would not intrude upon federal interests. The other (criminal charges) would clearly interfere with and inflict injury to the federal

interests. They chose that course which would be injurious to the federal interests. § 40116 required that they utilize that alternative which would not interfere with the federal interests.[1]

Minnesota officials were well aware of § 40116 and the federal interests which Congress sought to protect. They knew that Mattmiller was a high ranking officer in the United States Air Force Reserve. They knew that under federal regulations promulgated since 9/11 a felony conviction would remove Mattmiller from, not only his duties as a pilot and flight instructor, but also his *station in national defense*. They knew that their actions would imperil the interests of 50,000 pilots and the public who rely upon them. They knew they would intrude upon the federal interests of public safety and national defense. They knew they would also intrude upon federal financial interests. By eliminating the pilot income of those convicted, they would diminish federal taxes received (up to $70,000 per pilot). They knew that many thousands of U.S. taxpayer dollars spent to train Mattmiller as a Reserve Officer would be rendered valueless if their actions forced him from his office

In the Court below Minnesota urged that it could not abide laws such as § 40116 because this would unduly interfere with the State's inherent right to tax. That argument rests upon the false assumption that Minnesota had only the criminal remedy available. It had civil options, fully available and commonly used, which would have been non-intrusive on the federal interests and which

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[1] Mattmiller and other pilots criminally charged were not "tax protestors". Press coverage at the time revealed that numerous Minnesota police officers were "protestors", in that they had attempted classic "tax protestor" activities and filings. In spite of such officers having *no federal protections*, Minnesota officials proceeded against them *civilly*, while the pilots, *who did have federal protections*, they selected for *criminal prosecution*..

would have been equally effective. And it should be remembered, Minnesota elected to file criminal charges at a time when *there had been no prior court decision shedding any light on the impact of § 40116 and whether a State might tax such pilot income.*

**B. Comity and State Exhaustion Procedurally Required that Minnesota Go Forward in the Least Intrusive Manner.**

Comity between sovereigns is not merely concerned with judicial acts. It also applies to ***legislative*** and ***executive*** acts. Hilton v. Guyat, 159 U.S. 113, 164 (1895); See also, Society Nat. Ind. Aero. v. U.S. District Court, 482 U.S. 522 (Footnote 27) (1987).

That respect due the other sovereign is mutual and reciprocal. Comity among nations is largely moral and voluntary, but in the context of our *federal system* it is a principal of right and of law, and therefore of necessity. Ex Parte Royall, 117 U.S. 241,252 (1886).

Final civil resolution, readily available and otherwise commonly used by Minnesota, would have resulted in full compliance. There were federal interests which would be imperiled by State criminal prosecution. It was in the interest of the United States that this matter be resolved with the least amount of interference to its interests. This is also in the interests of Minnesota citizens. As a matter of comity, the State had a duty to exhaust civil remedies prior to utilizing the most intrusive means. It had a duty to the federal sovereign to use the least injurious means of implementing its own rule.

In Younger v. Harris, 401. U.S. 37, 44 (1971) this Court stated that federal abstention is based upon comity and:

> "What the concept does represent is a system in which *there is sensitivity to the legitimate interests of both State and National Governments,* and in which the National Government, anxious though it may be to vindicate and

protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States." (Emphasis added).

States likewise have an equal obligation to be sensitive to the federal needs. Minnesota had fully available to it less intrusive means to attain its objectives. Those obligations of civil exhaustion and state abstention were not honored. As matter of law they should have been. It was error for Minnesota to fail to do so. This being a direct review of the Minnesota Courts, it is appropriate that this Court so determine.

## REASON III

**IN REVIEWING A STATE FELONY CONVICTION THE MINNESOTA COURT OF APPEALS HAS DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY WHICH DENIES FEDERAL DUE PROCESS BY ALLOWING MINNESOTA TO PROCEED AGAINST HIM ON CONFLICTING THEORIES THAT HE WAS A DOMICILED RESIDENT, OR THAT HE WAS NON-DOMICILED BUT PRESENT MORE THAN 183 DAYS, AND BY NOT REQUIRING THE JURORS TO UNANIMOUSLY AGREE ON ONE THEORY.**

A pre-trial Motion In Limine sought an order barring Minnesota from presenting evidence because of the preemptive effect of 49 U.S.C. § 40116. This was denied. A Jury Instruction embodying 49 U.S.C. § 40116 was requested and denied. The prohibited 183-Day theory was submitted in the alternative.

**A. The Jury rendered a prohibited general verdict, and there is no commonality in the two theories presented.**

The alternative 183-Day theory as applied to an airline pilot rests upon a state law which violates superior federal law and is preempted. That theory should not have been submitted to the Jury.

When the State relies upon two independent legal theories, one of which is impermissible because of federal law, and the Jury is allowed to render a general verdict using either theory, it must be set aside. See, Yates v. United States, 354 U.S. 298, 312 (1957); Williams v. North Carolina, 317 U.S. 287, 291 (1942); Stromberg v. California, 283 U.S. 359, 367-68 (1931).

Allowing the Jury members to arrive at a verdict of guilty under two conflicting theories and not requiring them to agree unanimously on one also violates the fundamental fairness and the rationality guaranteed by Fourteenth Amendment Due Process as described in Schad v. Arizona, 501 U.S. 624 (1991). In Schad this Court found no error when Jury members were allowed to arrive at a first degree murder conviction under either a premeditated or felony murder theory. The underlying reason for allowing such independent theories was that *there was a mens rea element common* to both.

Two conflicting theories were submitted to the Jury:

1. Mattmiller was a domiciliary of Minnesota and set out with intent to evade Minnesota taxes by claiming to be a resident of Washington.
2. Although he was a bona fide domiciliary of Washington, he was present in Minnesota more than 183 days, owned an abode in Minnesota, and therefore is deemed by Minnesota to be a resident.

The first theory presupposes an evil intent – an intent to purposely evade Minnesota taxation. This requires a showing that his claim of being an Washington domiciliary was not in good faith, untrue and done solely from bad motives, that is, to evade Minnesota taxation.

The second theory assumes that he was a bona fide domiciliary of Washington whose resident status in Minnesota arises merely from his being present there more than 183 days. It

requires no evil intent. It may innocuously stem solely from mistake, inadvertence or employer cause.

The elements are totally different. The first involves evil intent. The second element involves non-evil acts or omissions. There is no commonality of wrongful design as this Court found in Schad. It is error to lump these conflicting theories together and allow some Jurors to find one and others to find another.

## REASON IV

**IN REVIEWING A STATE FELONY CONVICTION THE MINNESOTA COURT OF APPEALS HAS DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY WHICH DENIES FEDERAL DUE PROCESS BY HOLDING THAT MINNESOTA LAW DEFINING "DOMICILED RESIDENT" IS NOT IMPERMISSIBLY VAGUE AND INDEFINITE.**

Prior to trial Mattmiller filed a Motion to Dismiss for the reason that Minn Rule 8001.0300 was unconstitutionally vague as applied to him. That motion was denied.

**A. Minn. R. 8001.0300, in addressing Residency for taxation purposes, is so lacking in definition that it provides no adequate guidance to persons of ordinary intelligence, and that lack of specificity is compounded in light of Section 40116.**

Vague laws trap the innocent. Criminal laws must not leave persons of ordinary intelligence to guess at their meaning. A statute that employs numerous factors to be considered and weighed bears a great risk of being unconstitutionally vague. Cline v. Frink Dairy Co., 274 U.S. 445 (1927). There, this Court held provisions of a Colorado law unconstitutional because they left "the whole statute without a fixed standard of guilt...." Indeed, the Act involved "so many factors of varying effect that neither the person to decide in advance nor the jury to try him after the fact can safely and certainly judge the result." Id at 465. That frailty is

compounded many times here in considering the residency *of a pilot*. Because of the *federal prohibitions* imposed by § 40116 some of the *traditional* Minnesota factors listed in Rule 8001.0300 *cannot apply* as stated. Further, those factors must be viewed in the light that Mattmiller was also a U.S. Air Force Reserve officer stationed in Washington.

In U.S. v. Minnesota, 97 F. Supp. 2d 973 (D. Minn 2000) Minnesota had targeted individuals working for the U.S. Public Health Service, claiming domicile in Alaska. That federal court held (without benefit of any statute comparable to § 40116) that the residency of an individual's immediate family does not provide a direct nexus between that individual and the state which would allow a finding of Minnesota domicile (contrary to Minnesota's claimed presumption).

**B. Minn. R. 8001.0300, in addressing Residency for taxation purposes, invites arbitrary enforcement.**

The void-for–vagueness doctrine also dictates that a statute be sufficiently definite to avoid arbitrary and discriminatory enforcement. Kolender v. Lawson, 461 U.S. 362, 357 (1983). Minn. R. 8001.0300, subp. 3, with it's A to Z factors "furnishes a convenient tool for harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure." Id. at 360. Any pilot, whose base is Minnesota and whose wife lives in the State, along with any, or perhaps no other factors, is vulnerable to prosecution. None of these factors, together or alone, necessarily indicate an intent to abandon a former domicile. This becomes even more so when one views those Minnesota factors in light of § 40116. Minn. Stat. § 289A.63 relies totally upon the executive promulgation of Minn. R. Minn. R. 8001.0300. Standing together they are unconstitutionally vague. When an attempt is made to apply their terms to an airline pilot operating in reliance upon § 40116 they fail totally to provide any guidance whatsoever.

## REASON V

**IN REVIEWING A STATE FELONY CONVICTION THE MINNESOTA COURT OF APPEALS HAS DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY WHICH DENIES FEDERAL DUE PROCESS BY ALLOWING SUBSTANTIVE EVIDENCE TO THE JURY, AND INSTRUCTING, THAT MATTMILLER HAD THE DUTY TO MAINTAIN AND PRODUCE RECORDS TO PROVE THAT HE WAS NOT A RESIDENT, THEREBY IMPERMISSIBLY PLACING THE BURDEN OF PROOF UPON HIM AS A CRIMINAL DEFENDANT**

The State introduced as Exhibit 118 Chapter 8001.0300 of the DOR rules. This required Mattmiller to produce "adequate records to substantiate that more than one-half of the tax year was spent outside Minnesota." (subp 5). This provision was also included in the Jury Instructions. Mattmiller timely objected.

**A. The shifting of the burden to Mattmiller violated his Due Process right to a fair trial.**

The State must establish each element of a crime beyond a reasonable doubt. Patterson v. New York, 432 U.S. 197, 204 (1977); In re Winship, 397 U.S. 358 (1970). Because a reasonable Juror could have interpreted the Exhibit and Instruction as requiring the Mattmiller to prove his innocence, the resulting conviction should be reversed. Sandstrom v. Montana, 442 U.S. 510 (1979). Any statement made which creates the impression that the defendant has the burden of proof, and the resulting confusion which must arise, even in the face of another Jury Instruction correctly setting forth the burden is adequate basis for reversal.

Minnesota Rule 800.0300, as Exhibit 118, and the Jury Instructions both told the Jury in unequivocal language that Mattmiller had a duty to produce records proving his absence from Minnesota for more than one-half the year. They allude to *presumptions* of residency which directly conflict with *federal* § 40116. If Mattmiller did not provide such records the Jury was

informed it could summarily judge him guilty notwithstanding any other evidence. At the very least, this likely led to confusion and became a pivotal reason for reaching their finding of guilt. Misstatement of this nature by a prosecutor would warrant reversal. Introduction of the Official Rule itself coupled with a statement *from the Court* approving it must, *a fortiori,* require it. No offsetting instruction could suffice to render it harmless.

## CONCLUSION AND PRAYER

The decision of the Minnesota Court of Appeals and the decision of the Supreme Court of Minnesota refusing to review and correct it, conflict with superior federal law and decisions of this Court. Therefore, Rodney Alan Mattmiller respectfully prays that this Court grant the Petition of Writ of Certiorari to review and reverse that decision and his felony convictions.

Respectfully submitted,

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RODNEY ALAN MATTMILLER

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**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A03-472**

State of Minnesota,
Respondent,

vs.

Rodney Alan Mattmiller,
Appellant.

**Filed June 8, 2004**
**Affirmed**

**Crippen, Judge***

Washington County District Court
File No. K0-02-2092

Mike Hatch, Attorney General, 1800 NCL Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Amy Klobuchar, Hennepin County Attorney, Jean E. Burdorf, Assistant County Attorney, C-2000 Government Center, Minneapolis, MN 55487 (for respondent)

William J. Mauzy, John M. Huberty, Mauzy Law Firm, 510 First Avenue North, Suite 610, Minneapolis, MN 55403 (for appellant)

Considered and decided by Minge, Presiding Judge, Shumaker, Judge, and Crippen, Judge.

## UNPUBLISHED OPINION

**CRIPPEN,** Judge

Appellant challenges his conviction of failure to pay state income tax and state sales tax on his vehicles, stating that he was prejudiced by the admission of evidence as to other bad acts. Finding no merit in this or other contentions by appellant, we affirm.

## FACTS

Beginning in the early 1980s and continuing through the 2000 tax year, appellant Rodney Alan Mattmiller, a pilot for Northwest Airlines (NWA), claimed Washington as his state of residence, but he does not own or rent any real property in Washington. Washington does not have a state income tax. From 1992 until 2001, NWA based appellant in Minneapolis, Minnesota. Appellant owns a home in Hastings, Minnesota, in which his wife and children live. Appellant owns three vehicles, all of which are licensed in the state of Oregon; Oregon does not have a motor vehicle tax.

On November 13, 2001, authorities executed a search warrant at appellant's Hastings residence. During the search, authorities discovered evidence indicating that appellant is a resident of Minnesota, not Washington. Following execution of the search warrant, appellant was charged with five counts of filing fraudulent Minnesota income tax returns during the tax years 1996-2000, in violation of Minn. Stat. § 289A.63, subd. 2(a) (2000); five counts of tax evasion during the tax years 1996-2000, in violation of Minn. Stat. § 289A.63, subd. 1(b) (2000); and

two counts of failure to pay motor vehicle tax, in violation of Minn. Stat. § 297B.10(a) (2000).

Appellant filed a motion to dismiss the complaint, arguing that the definitions of resident in Minn. Stat. § 290.01, subd. 7 (2000) and Minn. R. 8001.0300, subp. 1 (2001), are unconstitutionally vague. Appellant also filed a motion in limine requesting an order barring respondent State of Minnesota from presenting evidence that he evaded Minnesota income taxes, arguing that federal law preempts Minnesota law. The district court denied both motions.

Prior to trial, respondent filed a motion to admit evidence of other bad acts. Specifically, respondent sought to admit two employment disciplinary incidents occurring in 1991 while appellant was employed as a pilot for NWA. Respondent also sought to admit evidence that appellant falsely claimed to be an Oregon resident on a 1996 vehicle registration application, and appellant allegedly submitted fraudulent travel vouchers to the United States Air Force. The district court admitted evidence of all of these incidents.

At the close of evidence, the district court instructed the jury that appellant was required to keep adequate records to prove that he spent greater than one-half of the tax year outside of the state. Appellant objected, arguing that this impermissibly shifted the burden of proof to him.

The jury found appellant guilty of three counts of filing false or fraudulent returns, one count of failure to pay motor vehicle tax, and three counts of tax evasion. The evasion counts were merged under Minn. Stat. § 609.035 (2000), and appellant was sentenced on the four remaining counts. The sentences were stayed, and the district court required appellant to serve 120 days. All sentences were to run concurrently, but the stay conditions required appellant to serve 30 days in the in-custody sentence-to-serve

program, followed by 90 days in the out-of-custody sentence-to-serve program. Appellant was also required to pay the unpaid taxes, along with interest, penalties, restitution, and fines.

After the jury returned their guilty verdicts, one of the jurors informed appellant's counsel that the jury made a mistake in finding appellant guilty of "willfully" failing to pay taxes under the three tax evasion counts, rather than "knowingly" failing to pay taxes. Eleven of the twelve jurors confirmed the mistake, and appellant moved for a *Schwartz* hearing. The district court denied this motion.

Appellant challenges his conviction arguing that (1) the district court erred in admitting evidentiary items as *Spreigl* evidence; (2) the district court impermissibly shifted the burden of proof by instructing the jury that appellant was required to keep adequate records; (3) the evidence was insufficient to support the guilty verdicts; (4) Minn. Stat. § 290.01, subd. 7 (2000), and Minn. R. 8001.0300 are preempted by federal law; (5) Minn. Stat. § 290.01, subd. 7, and Minn. R. 8001.0300 are unconstitutionally vague; and (6) the district court erred in denying appellant's request for a *Schwartz* hearing.

## DECISION

### 1.

Appellant argues that he was prejudiced by the admission of false statements made on Oregon vehicle registration applications, his alleged submission of fraudulent travel vouchers to the U.S. Air Force, and respondent's reference to those items during closing arguments. Evidence of other crimes or bad acts is characterized as "*Spreigl* evidence." *State v. Kennedy*, 585

N.W.2d 385, 389 (Minn. 1998). The admission of *Spreigl* evidence lies within the sound discretion of the district court and will not be reversed absent a clear abuse of discretion. *State v. Spaeth*, 552 N.W.2d 187, 193 (Minn. 1996). To prevail, an appellant must show error and prejudice resulting from the error. *State v. Loebach*, 310 N.W.2d 58,64 (Minn. 1981).

Here, respondent filed a motion to admit character evidence of the Oregon vehicle registration and travel vouchers as *Spreigl* evidence. The district court allowed this evidence under Minn. R. Evid. 404(b), which states in relevant part:

> Evidence of another crime, wrong, or act is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Appellant argues that the district court's ruling should be reversed because it stated in its order that the evidence is probative to both the appellant's "credibility as a witness and also reflects on a pattern or practice regarding his disclosure of accurate information over an extensive period of time." But a respondent on appeal can defend a district court's ruing on any ground that the law and record permit without expanding the relief that has been granted. *State v. Grunig*, 660 N.W.2d 134, 136 (Minn. 2003). Thus, the district court's decision must stand if the evidentiary items are admissible under any rule of evidence.

As respondent asserts, courts distinguish between *Spreigl* evidence and evidence offered to prove elements of

the charged offense. *See State v. Woffard*, 262 Minn. 112, 118, 114 N.W.2d 267, 271 (1962). (declaring right of state to "make out its whole case against the accused on any evidence which is otherwise relevant upon the issue of the defendant's guilt of the crime with which he was charged"). This evidence-law principle applies even though the facts tend to prove commission of another crime, such as "where two or more offenses are linked together in point of time or circumstances so that one cannot be fully shown without proving the other, or where evidence of other crimes constitutes part of the res gestae." *Id.*

Appellant was charged with evading the sales tax owed on the purchase of a Chevrolet Blazer in 1996 and a Chrysler Town and Country Minivan in 1999. Minn. Stat. § 297B.02 (2000) imposes a tax on the purchase price of vehicles required to be registered in Minnesota. And Minn. Stat. § 297B.06 (2000) states that registration plates shall not be issued unless the tax imposed by Minn. Stat. § 297B.02 is paid to the motor vehicle registrar. Evidence at trial indicated that appellant drove both vehicles while in Minnesota; appellant is not an Oregon resident. Under these circumstances, appellant could not have legally driven those vehicles in Minnesota unless they were registered. From the introduction of the Oregon vehicle registration forms, the jury could have properly inferred that appellant licensed those vehicles in Oregon so that he could obtain license plates on the vehicles while avoiding Minnesota tax. The Oregon vehicle registration application is relevant to prove facts that tend to establish elements of the charged offense, and the district court did not err in admitting this evidence.

Similarly, we conclude that the military travel vouchers were properly introduced into evidence to prove elements of the charged offenses. A necessary element of

the crimes appellant was charged with was that he was a resident of Minnesota at relevant times. To prove that appellant was a resident, it was necessary for respondent to prove that appellant was either domiciled in Minnesota, or domiciled outside Minnesota while maintaining a place of abode in the state and spending in the aggregate more than one-half the tax year in Minnesota. Minn. Stat. § 290.01, subd. 7 (2000).[1]

The facts regarding submission of military vouchers were admitted into evidence to prove the number of days that appellant was present in Minnesota. They were relevant to prove a required element of the charged offenses. Respondent also introduced NWA documents to prove the days appellant spent in Minnesota. There were inconsistencies between the travel vouchers and NWA documents; appellant addressed these inconsistencies in his testimony, and he was questioned on cross-examination as to the accuracy of the vouchers. We conclude that evidence of the military travel vouchers is relevant to prove facts that tend to establish elements of the charged offense and the district court did not err in admitting this evidence. And the record shows that error, if any, caused by statements made by respondent during closing argument on the travel vouchers, was harmless beyond a reasonable doubt.

**2.**

Appellant also argues that the district court erred in admitting evidence of previous employment disciplinary incidents. These evidentiary items were admitted under Minn, R. Evid. 404(b). While we conclude that these may not be admissible under rule 404(b), the district court's decision must stand if the incidents are admissible under any rule of evidence. *Grunig*, 660 N.W.2d at 136.

One of the disciplinary acts resulted from appellant making a false representation to a senior pilot and the other from appellant allowing his then-girlfriend to use his travel pass. While neither of those acts tends to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, they are admissible to attack appellant's credibility under Minn. R. Evid. 608(b).

Rule 608(b) states that specific instances of conduct of a witness may be used to attack a witness's credibility on cross-examination if the conduct concerns the witness's character for truthfulness. The rule does not allow extrinsic evidence to prove prior bad acts and grants the district court discretion to exclude evidence that is more prejudicial than probative. No extrinsic evidence was offered to prove the two incidents of misconduct, and both acts involved dishonesty. They concerned the appellant's propensity for truthfulness.

Appellant argues that evidence of the disciplinary incidents lacks probative value because they are old. But unlike rule 609, rule 608(b) does not contain any time limitation to the admission of evidence attacking the credibility of a witness. And the district court acted within its discretion in ruling the evidence more probative than prejudicial. Therefore, we conclude that the district court did not err in admitting evidence of the disciplinary incidents.

**3.**

Appellant also argues that the district court committed prejudicial error by admitting into evidence and including in its jury instructions the rule that requires any person claiming to be a non-resident of the state to "have available for examination adequate records to substantiate that more

than one-half of the tax year was spent outside Minnesota." Minn. R. 8001.0300, subp. 5 (2001). Appellant claims that the rule impermissibly shifted to him the burden of proving his innocence.

Evidentiary rulings rest within the district court's broad discretion and will not be reversed absent an abuse of that discretion. *State v. Lee*, 645 N.W.2d 459, 465 (Minn. 2002). Jury instructions also lie within the discretion of the district court and will not be reversed absent an abuse of discretion. *State v. Cole*, 542 N.W.2d 43, 50 (Minn. 1996). A defendant claiming that the district court abused its discretion in admitting evidence bears the burden of proving both error and prejudice. *Lee*, 645 N.W.2d at 465. An error is prejudicial only if it "substantially influenced the jury to convict." *Id.*

In every criminal prosecution, the state has the burden of proving the charged crime beyond a reasonable doubt. *State v. Robinson*, 604 N.W.2d 355, 362 (Minn. 2000). The tax evasion charges in this case required respondent to prove beyond a reasonable doubt that appellant was a resident of Minnesota. The court so instructed the jury.

Minn. R. 8001.0300, subp. 5, places an administrative burden on taxpayers and permits an inference that taxpayers who do not maintain adequate records might have been lying about their nonresident status. *State v. Enyeart*, 676 N.W.2d 311, 325 (Minn. App. 2004), *review denied* (Minn. May 18, 2004). "But the rule does not release the state of its obligation of proving beyond a reasonable doubt, with or without the taxpayer's records, that the taxpayer spent more than one-half the tax year in the state." *Id.* "And a conviction could not be based merely on evidence that the taxpayer failed to maintain adequate records." *Id.*

In *Enyeart*, a factually similar case, this court recently held that admission of Minn. R. 8001.0300, subp. 5, is not

error. *Id.*, 676 N.W.2d at 325. This is true, this court held, even though the jury is able to draw negative inferences from the taxpayer's failure to maintain records. *Id.* These inferences are acceptable "when they have a reasonable relation to the circumstances of life as we know them, and the facts are likely to be much more easily provable by the defendant than by the state, and the nature of the charge ... makes it fair to call on the defendant to produce evidence." *Id.* (quotation omitted). The district court did not err in admitting the rule into evidence.

We also conclude that instructing the jury on the rule was not error. The rule had been properly admitted into evidence, the district court properly instructed the jury on the burden of proof, and the instruction on Minn. R. 8001.0300, subp. 5, did not occur in the portion of the jury instructions on burden of proof. The district court did not err in instructing the jury and, in light of the overwhelming evidence of guilt, any error was harmless beyond a reasonable doubt.

**4.**

Appellant also argues that the evidence is insufficient to support the jury's verdict. In considering a claim of insufficient evidence, this court's review is limited to a painstaking analysis of the record to determine whether the evidence, when viewed in the light most favorable to the conviction, is sufficient to allow jurors to reach the verdict that they did. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). The reviewing court must assume the jury believed the state's witnesses and disbelieved any evidence to the contrary. *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). This is especially true when resolution of the matter depends mainly on conflicting testimony. *State v. Pieschke*,

295 N.W.2d 580, 584 (Minn. 1980). The reviewing court will not disturb the verdict if the jury, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude the defendant was guilty of the charged offense. *State v. Alton*, 432 N.W.2d 754, 756 (Minn. 1988).

Here, there is substantial evidence to support the jury's verdict finding appellant guilty of failing to pay motor vehicle tax. Appellant admitted at trial that he gave false information on an Oregon vehicle registration application. Even though he testified that it was not his intent to avoid Minnesota motor vehicle tax, the jury could have inferred that appellant registered his vehicles in Oregon to avoid paying the tax. Credibility determinations are left to the jury.

There is also substantial evidence to support the guilty verdict on the other six counts. Appellant was required to pay Minnesota state income tax if he either was domiciled in Minnesota or maintained a place of abode in the state and spent in the aggregate more than one-half of the days of the relevant tax years in Minnesota. Minn. Stat. § 290.01, subd. 7. First, there is adequate evidence to suggest that appellant is domiciled in Minnesota because his family is in Minnesota, which creates a presumption that appellant is also domiciled in Minnesota. Minn. R. 8001.0300, subp. 2. The factors used to determine domicile also indicated that appellant was domiciled in Minnesota. Minn. R. 8001.0300, subp. 3. For instance, (1) appellant has a permanent job base in Minnesota; (2) appellant recently moved into a new house in Minnesota and sold real property that he previously owned in Washington; (3) appellant does not rent any property in Washington; (4) the only real property appellant owns is in Minnesota; (5) appellant's vehicles are

insured and physically located in Minnesota; (6) none of appellant's vehicles are licensed or located in Washington; (7) appellant receives mail in Minnesota and has mail forwarded to his Minnesota address; (8) appellant made statements on mortgage applications indicating he is a Minnesota resident; and (9) several items discovered during the execution of a search warrant at appellant's Minnesota residence indicated that it was his permanent home.

It is undisputed that appellant owns a home in Minnesota, and respondent introduced into evidence documentation to support the fact that appellant spent more that half of the days in the relevant years in Minnesota. Numerous flight documents from both NWA and the United States Air Force support a jury finding that appellant was present in Minnesota for more than 183 days during each of the years for which he was convicted for not paying Minnesota income tax. The evidence is sufficient to support the guilty verdicts.

**5.**

Appellant argues that 49 U.S.C. § 40116 (2000) preempts the state's method of calculating days spent in Minnesota in cases involving the nondomiciliary status of air-carrier employees. Appellant also argues that the definitions of residency in Minn. Stat. § 290.01, subd. 7, and Minn. Rule 8001.0300 are unconstitutionally vague.

In *Enyeart*, this court addressed the issue of whether 49 U.S.C. § 40116 preempts Minn. Stat. § 290.01, subd. 7, holding that Minn. Stat. § 290.01, subd. 7, was not in "irreconconciliable conflict" with 49 U.S.C. § 40116. *Enyeart*, 676 N.W.2d at 323, 325. Therefore, we concluded that 49 U.S.C. § 40116 did not preempt Minnesota law. *Enyeart*, 676 N.W.2d at 325. Similarly, for the reasons

discussed in *Enyeart*, we conclude that Minn. Stat. § 290.01, subd. 7, is not preempted by federal law, and the district court did not err in denying appellant's motion.

In *Enyeart*, the defendant also challenged Minn. Stat. § 290.01, subd. 7, and Minn. R 8001.0300, subp. 1, on the grounds that their definitions of "residency" are void for vagueness. 676 N.W.2d at 318. We held the definitions of residency are not unconstitutionally vague on their face and that they were not vague as applied to the defendant. *Id.* at 321-22. Here, as in *Enyeart*, the factors used to determine residency so overwhelmingly indicate that appellant is a Minnesota resident that a reasonable person in his position would have adequate notice as to what the law commands. The definitions of residency in Minn. Stat. § 290.01, subd. 7, and Minn. R 8001.0300 are not unconstitutionally vague on their face or as applied to appellant.

**6.**

Finally, appellant argues that the district court erred in denying his request for a *Schwartz* hearing. The district court should be liberal in granting a hearing, but the defendant must first present evidence that, if unchallenged, would warrant the conclusion that jury misconduct occurred. *State v. Rainer*, 411 N.W.2d 490, 498 (Minn. 1987).

The purpose of a *Schwartz* hearing is to investigate potential juror misconduct and prevent the practice of attorneys contacting and questioning jurors after a verdict has been rendered. *Arney v. Helbig*, 383 N.W.2d 4, 6 (Minn. App.1986). But Minn. R. Evid. 606(b) does not allow a court to inquire whether any juror based his or her verdict in part on a mistaken statement of the law. *Pajunen*

*v. Monson Trucking, Inc.*, 612 N.W.2d 173, 176 (Minn. App. 2000), *review denied* (Minn. Aug. 15, 2000).

Rule 606(b) only allows inquiry into "whether extraneous prejudicial information was improperly brought to the jury's attention, or whether any outside influence was improperly brought to bear upon any juror, or as to any threats of violence or violent acts brought to bear on jurors, from whatever source, to reach a verdict." The evidence indicates that the jurors may have misunderstood the law. Appellant argues that the jurors made a mistake in finding appellant guilty of "willfully" rather than "knowingly" failing to pay taxes. This type of mistake would constitute a misunderstanding of the law for which rule 606(b) does not allow inquiry. The district court did not abuse its discretion in denying appellant's motion for a *Schwartz* hearing.

**Affirmed.**

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. Art. VI § 10.

STATE OF MINNESOTA

IN SUPREME COURT

A03-472

State of Minnesota,

Respondent,

vs.

Rodney Alan Mattmiller,

Petitioner.

ORDER

Based upon all the files, records, and proceedings herein,

IT IS HEREBY ORDERED that the petition of Rodney Alan Mattmiller for further review be, and the same is, denied.

Dated: August 17, 2004

BY THE COURT:

/s/ Alan C. Page .

Alan C. Page
Associate Justice

BLATZ, C.J., took no part in the consideration of decision of this case

49 U.S.C. § 40116 entitled **"State Taxation"**

(f) **Pay of air carrier employees.**

(1) In this subsection –

(A) "pay" means money received by an employee for services.

(B) "State" means a State of the United States, the District of Columbia, and a territory or possession of the United States.

(C) an employee is deemed to have earned 50 percent of the employee's pay in a State or political subdivision of a State in which the scheduled flight time of the employee in the State or subdivision is more than 50 percent of the total scheduled flight time of the employee when employed during the calendar year.

(2) The pay of an employee of an air carrier having regularly assigned duties on aircraft in at least 2 States is subject to the income tax laws of only the following:

(A) the State or political subdivision of the State that is the residence of the employee.

(B) the State or political subdivision of the State in which the employee earns more than 50 percent of the pay received by the employee from the carrier.

49 USCS § 46301 **Civil penalties.**

**(a) General penalty**. (1) A person is liable to the United States Government for a civil penalty of not more than $1,000 for violating –

(A) chapter 401 [49 USCS §0§ 40101 et seq.] (except sections 40103(a) and (d), 40105, 40116, and 40117)...

49 USCS § 46316. **General criminal penalty when specific penalty not provided.**

**(a) Criminal penalty**. Except as provided by subsection (b) of this section, when another criminal penalty is not provided under this chapter [49 USCS §§ 46301 et seq.] a person that knowingly and willfully violates this part [49 USCS §§ 40101 et seq.], a regulation prescribed or order issued by the Secretary of Transportation (or the Administrator of the Federal Aviation Administration with respect to aviation safety duties and powers designated to be carried out by the Administrator) under this part [49 USCS §§ 40101 et seq.], or any term of a certificate or permit issued under section 41102, 41103, or 41302 of this title shall be fined under title 18. A separate violation occurs for each day the violation continues.

(b) **Nonapplication**. Subsection (a) of this section does not apply to chapter 401 [49 USCS §§ 40101et seq.] (except sections 40103(a) and (d), 40105, 40116 and 40117), chapter 441 (except section 44109), chapter 445, chapter 447 (except section 44718(a), and chapter 449 (except sections 44902, 44904, and 44907-44909 of this title.

(Added Pub.L. 103-272, § 1(e), July 5, 1994, 108 Stat. 1240, and amended Pub.L. 105-102, § 3(d)(I)(D), Nov. 20, 1997, 111 Stat.2215.) ....

**Excerpts from Legislative History of 49 U.S.C. § 46319**

[I]n subsection (a) the word "prescribed" is added for consistency with the revised title. The words "condition, or limitation of" are omitted as surplus. The word "Administrator in

section 902(a) of the Federal Aviation Act of 1958 (Public Law 85-726, 73 Stat. 784) is retained on authority of 49:106(g). The words "or in section 1474 of this Appendix" are omitted because 49 App.:1474 is not included in the revised title. The words "shall be deemed guilty of a misdemeanor" are omitted for consistency with title 18. The words "and upon conviction thereof" are omitted as surplus. The words "shall be fined under title 18" are substituted for "shall be subject for the first offense to a fine of not more than $500, and for any subsequent offense to a fine of not more than $2,000" for consistency with title 18. ....

INCOME TAXATION – INTERSTATE CARRIERS AND EMPLOYEES PUBLIC LAW 91-569; 84 STAT. 1499 [H.R. 10634]

Sec. 4. (a) Title XI of the Federal Aviation Act of 1958 is amended by inserting after section 1111 the following new section:

> "Sec. 1112. (a) No part of the compensation paid by any air carrier to an employee who performs his regularly assigned duties as such an employee on an aircraft in more than one State shall be withheld for income tax purposes pursuant to the laws of any State or subdivision thereof other than the State or subdivision wherein more than 50 per centum of the compensation paid by the carrier to such employee is earned: *Provided however*, That if the employee did not earn more than 50 per centum of his compensation from said carrier in any one State or subdivision thereof during the preceding calendar year, then withholding shall be required only for the State or subdivision of the employee's residence, as shown on the employment records of any such carrier; . . . .

18 U.S.C. § 3571. **Sentence of fine.**

(a) **In general.** – A defendant who has been found guilty of an offense may be sentenced to pay a fine.

(b) **Fines for individuals.**– Except as provided in subsection (e) of this section, an individual who has been found guilty of an offense may be fined not more than the greatest of—

(1) the amount specified in the law setting forth the offense;

(2) the applicable amount under subsection (d) of this section;

(3) for a felony, not more than $250,000;

(4) for a misdemeanor resulting in death, not more than $250,000;

(5) for a Class A misdemeanor that does not result in death, not more than $100,000;

(6) for a Class B or C misdemeanor that does not result in death, not more than $5,000; or

(7) for an infraction, not more than $5,000.

(b) **Fines for organizations.**– Except as provided in subsection (e) of this section, an organization that has been found guilty of an offense may be fined not more than the greatest of—

(1) the amount specified in the law setting forth the offense;

(2) the applicable amount under subsection (d) of this section;

(3) for a felony, not more than $500,000;

(4) for a misdemeanor resulting in death, not more than $500,000;

(5) for a Class A misdemeanor that does not result in death, not more than $200,000;

(6) for a Class B or C misdemeanor that does not result in death, not more than $10,000;

(7) for an infraction; not more than $10,000.

(c) **Alternative fine based on gain or loss.**– If any person derives pecuniary gain from the offense, or if the offense results in pecuniary loss to a person other than the defendant, the defendant may be fined not more than the greater of twice the gain or twice the gross loss, unless imposition of a fine under this subsection would unduly complicate or prolong the sentencing process.

(d) **Special rule for lowering fine specified in substantive provision.**– If a law setting forth an offense specifies no fine or a fine that is lower than the fine otherwise applicable under this section and such law, by specific reference, exempts the offense from the fine otherwise applicable under this section, the defendant may not be fined more than the amount specified in the law setting forth the offense.

Minn. Stat. 290.01 **Definitions**. (a) The term "resident" means any individual domiciled in Minnesota . . . .

(b) "Resident" also means any individual domiciled outside the state who maintains a place of abode in the state and spends in the aggregate more than one-half of the tax year in Minnesota . . . .

[F]or purposes of this subdivision, presence within the state for any part of a calendar day constitutes a day spent in the state. Individuals shall keep adequate records to substantiate the days spent outside the state.

[T]he term "abode" means a dwelling maintained by an individual, whether or not owned by the individual an whether or not occupied by the individual, an includes a dwelling place owned or leased by the individual's spouse.

Minn. Stat. **289A.63 Criminal penalties.**

Subdivision 1. **Penalties for knowing failure to file or pay; willful evasion.**. (a) A person required to file a return, report, or other document with the commissioner, who knowingly, rather than accidentally, inadvertently, or negligently, fails to file it when required, is guilty of a gross misdemeanor. A person required to file a return, report, or other document who willfully attempts in any manner to evade or defeat a tax by failing to file it when required, is guilty of a felony.

(b) A person required to pay or to collect and remit a tax, who knowingly, rather than accidentally, inadvertently, or negligently, fails to do so when required, is guilty of a gross misdemeanor. A person required to pay or to collect and remit a tax, who willfully attempts to evade or defeat a tax law by failing to so when required, is guilty of a felony.

Subd. 2. **False or fraudulent returns; penalties.** (a) A person who files with the commissioner a return, report, or other document, known by the person to be fraudulent or false concerning a material matter, is guilty of a felony.

(e) A person who knowingly aids or assists in, or advises in the preparation or presentation of a return, report, or other document that is fraudulent or false concerning a material matter, whether or not the falsity or fraud committed is with the knowledge or consent of the person authorized or required to present the return, report, or other document, is guilty of a felony.

Subd. 8. **Criminal penalties.** Criminal penalties imposed by this section are in addition to any civil penalties imposed by this chapter.

**Minnesota Rule 8001.0300 Submitted to the Jury as State's Exhibit 118**

## Minn. Rule 8001.300 RESIDENT AND DOMICILE DEFINED; CONSIDERATIONS.

Subpart 1. **Resident.** The term "resident" means:

A. any individual person who is domiciled in Minnesota, subject to the exception set forth in subpart 9; and

B. any individual person (other than an individual deemed a non-resident under the Soldiers' and Sailors' Relief Act of 1940, United States Code, title 50 appendix, section 574, or an individual eligible for reciprocity under Minnesota Statutes, section 290.081) who is not domiciled in Minnesota but who maintains a place of abode in Minnesota and spends in the aggregate more than one-half of the taxable year in Minnesota.

A person may be a resident of Minnesota for income tax purposes, and taxable as a resident, even though the person is not deemed a resident for other purposes.

Subp. 2. **Domicile; definition and presumptions.** The term "domicile" means the bodily presence of an individual person in a place coupled with an intent to make such a place one's home. The domicile of any person shall be that place in which that person's habitation is fixed, without any present intentions of removal therefrom, and to which, whenever absent, that person intends to return.

A person who leaves home to go into another jurisdiction for temporary purposes only is not considered to have lost that person's domicile. But if a person moves to another jurisdiction with the intention of remaining there permanently or for an indefinite time as a home, that person shall have lost that person's domicile in this state. The presumption is that a person who leaves this state to accept a job assignment in a foreign nation has not lost that person's domicile in this state.

The presumption is that the place where a person's family is domiciled is that person's domicile. The domicile of a spouse shall be the same as the other spouse unless there is affirmative evidence to the contrary or unless the husband and wife are legally separated or the marriage has been dissolved. When a person has made a home at any place with the intention of remaining there and the person's family neither lives there nor intends to do so, then that person shall have established a domicile separate from that person's family.

The domicile of a single person is that person's usual home. In case of a minor child who is not emancipated, the domicile of the child's parents is the domicile of the child. The domicile of the parent who has legal custody of the child is the domicile of the child. A person who is a permanent resident alien in the United States may have a domicile in this state. The domicile of a member of the armed forces will be governed by the facts just prior to becoming a member of the armed forces unless the person takes the necessary steps to establish a new domicile.

The mere intention to acquire a new domicile, without the facts of physical removal, does not change the status of the taxpayer, nor does the fact of physical removal, without the intention to remain, change the person's status. The presumption is that one's domicile is the place where one lives. An individual can have only one domicile at any particular time. A domicile once shown to exist is presumed to continue until the contrary is shown. An absence of intention to abandon a domicile is equivalent to an intention to retain the existing one. No positive rule can be adopted with respect to the evidence necessary to prove an intention to change a domicile but such intention may be proved by acts and declarations, and of the two forms of evidence, acts shall be given more weight than declarations. A person who is temporarily employed within this state does not acquire a domicile in this state if during such period the person is domiciled without this state.

Subp. 3. **Considerations.** The following items listed will be considered in determining whether or not a person is domiciled in this state:

A. location of domicile for prior years;

B. where the person votes or is registered to vote, but casting an illegal vote does not establish domicile for income tax purposes;

C. status as a student;

D. classification of employment as temporary or permanent;

E. location of employment;

F. location of newly acquired living quarters whether owned or rented;

G. present status of the former living quarters, i.e., whether it was sold, offered for sale, rented, or available for rent to another;

H. whether homestead status has been requested and/or obtained for property tax purposes on newly purchased living quarters and whether the homestead status of the former living quarters has not been renewed;

I. ownership of other real property;

J. jurisdiction in which a valid driver's license was issued;

K. jurisdiction from which any professional licenses were issued;

L. location of the person's union membership;

M. jurisdiction from which any motor vehicle license was issued and the actual physical location of the vehicles;

N. whether resident or nonresident fishing or hunting licenses purchased;

O. whether an income tax return has been filed as a resident or nonresident;

P. whether the person has fulfilled the tax obligations required of a resident;

Q. location of any bank accounts, especially the location of the most active checking account;

R. location of other transactions with financial institutions;

S. location of the place of worship at which the person is a member:

T. location of business relationships and the place where business is transacted ;

U. location of social, fraternal, or athletic organizations or clubs or in a lodge or country club, in which the person is a member;

V. address where mail is received;

W. percentage of time (not counting hours of employment) that the person is physically present in Minnesota and the percentage of time (not counting hours of employment) that the person is physically present in each jurisdiction other than Minnesota;

X. location of jurisdiction from which unemployment compensation benefits are received;

Y. location of schools at which the person or the person's spouse or children attend, and whether resident or nonresident tuition was charged; and

Z. statements made to an insurance company, concerning the person's residence, and on which insurance is based.

Any one of the items listed above will not, by itself, determine domicile.

Charitable contributions made by a person will not be considered in determining whether that person is domiciled in Minnesota.

Subp. 4. **Days within and days without Minnesota.** In counting the number of days spent within and without Minnesota, a person shall be treated as present in Minnesota on any day if the person is physically present in Minnesota at any time during that day. However, a person in transit between two points outside Minnesota who is physically present in Minnesota less than 24 hours, will not be treated as present in Minnesota on any day during transit.

Items A and B are examples of the application of this subpart:

A. T is flying from New York to California and must change flights in Minnesota. T is scheduled to arrive in Minnesota at 7:00 P.M. on March 1, and is scheduled to depart at 1:00 P.M. on March 2. Since T is in transit between two points outside Minnesota and is present instate less than 24 hours, neither March 1 or March 2 is treated as a day within Minnesota.

B. T has been in Minnesota from March 1 to April 15. On April 15, T departed from Minnesota at 6: A.M. T is treated as present in Minnesota on April 15.

Subp. 5. **Records.** Any person domiciled outside Minnesota who maintains a place of abode within Minnesota and claims to be a non-resident of the state must have available for examination adequate records to substantiate that more than one-half of the tax year was spent outside Minnesota.

Adequate records means any contemporaneously kept records that establish the places of physical presence of the person on particular dates. Adequate records include, but are not limited to, calendars, diaries, canceled checks, credit card receipts, and airline tickets.

Subp. 6. **Definition of abode.** An abode is a dwelling place permanently maintained by a person, whether or not owned and whether or not occupied by the person. It does not need to be permanent in the sense that the person does not intend to abandon it at some future time. However, a cabin or cottage not suitable for year round use and used only for vacations is not an abode. Additionally, quarters which contain sleeping arrangements but do not contain facilities for cooking or bathing will not generally be considered an abode.

A person who moves a domicile outside Minnesota is not considered to be maintaining an abode in Minnesota even though the person continues to own or rent a dwelling in Minnesota if the person has moved personal furnishings and belongings from the dwelling and is making a good faith effort to sell, lease, or sublease the dwelling.

Subp. 7. **Domiciliary residents.** The physical presence test does not apply to persons who are domiciled in Minnesota throughout the tax year. There is no presumption that a person domiciled in Minnesota has lost that domicile if the person is absent from Minnesota over one-half of the tax year.

Subp. 8. **Part year domiciliaries.** Persons domiciled in Minnesota who move their domiciles outside Minnesota during the tax year and persons domiciled outside Minnesota who move their domiciles to Minnesota during the tax year are part year residents

of Minnesota. The physical presence test does not apply to such persons unless a Minnesota abode is maintained during the period domiciled outside Minnesota.

Subp. 9. **Certain persons deemed nonresidents.** A person domiciled in Minnesota is deemed a nonresident for the period of time that the person is a qualified individual under the Internal Revenue Code, section 911, if no Minnesota homestead application is filed for any property in which the person has an interest during the period the person is a qualified individual. A homestead application filed before the move to a foreign country does not affect a person's eligibility for this exception.

Subp. 10. **Examples.** Items A to E contain examples of the application of this part:

A. T was domiciled in Minnesota from January 1, 1987, through September 1, 1987, and did not leave the state during that period. On September 2, 1987, T sold the Minnesota dwelling and changed domicile to Texas.

T was a part year resident of Minnesota in 1987. Although T was physically present in Minnesota over 183 days, the physical presence test does not apply because T did not maintain an abode during the part of the year T was not domiciled in Minnesota.

B. Same facts as item A., but decided not to sell the Minnesota abode.

T was a full year resident of Minnesota in 1987. T was physically present and maintained an abode in Minnesota.

C. Same facts as item A, but T did not sell the Minnesota dwelling although T listed it for sale with a real estate broker at fair market value from September 1 through December 31, 1987.

T was a part year resident of Minnesota in 1987, assuming T removed personal belongings and furnishings from the Minnesota domicile when T changed domicile. Although T was physically present over one-half of the year and continued to own a dwelling in Minnesota, T will not be considered to have maintained an abode in Minnesota because T moved belongings from the dwelling and made a good faith effort to sell the dwelling.

D. T moved from Minnesota to Florida on February 1, 1987. T maintained an abode in Minnesota and lived in that abode May 1, 1987 to September 1, 1987.

T was not a full year resident of Minnesota under the physical presence test. Although T maintained a Minnesota abode, T was not physically present in Minnesota over one-half of the year.

However, the department could review steps T took to change domicile and could consider T a full year resident if it were determined T remained domiciled in Minnesota.

E. T moved domicile to Minnesota on June 1, 1987. T did not have an abode in Minnesota prior to June 1, 1987. T was physically present in Minnesota throughout the period of June 1, 1987 to December 31, 1987.

T was a part year resident of Minnesota in 1987. Although T was physically present in Minnesota over one-half of the year, T did not have a Minnesota abode during the part of the year T was

domiciled outside the state. Therefore, the physical presence test does not apply.

Statutory Authority: MS s 290.52

History: 12 SR 2746; 17 SR 1279

**Portions of Germane Jury Instructions Given**

Under "Definitions"

"'Resident'

A person is required to pay a tax in the State of Minnesota if the person is a "resident" of the State of Minnesota. The Defendant was a "resident" of the State of Minnesota for a given year if:

A. The Defendant was "domiciled" in the State of Minnesota; or

B. The Defendant was "domiciled" outside the State of Minnesota but maintained a "place of abode" in Minnesota and spend 183 days or more in the State of Minnesota during that year."

* * * *

"Any person domiciled outside Minnesota who maintains a place of abode within Minnesota and claims to be a non-resident of the state must have available for examination adequate records to substantiate that more than one half of the tax year was spent outside Minnesota.

'Adequate records' means any contemporaneously kept records that establish the places of physical presence of the person on particular dates. Adequate records include but are not limited

to calendars, diaries, cancelled checks, credit card receipts and airline tickets.

In counting the number of days within and without Minnesota, a person shall be treated as present in Minnesota on any day if the person is physically present in Minnesota at any time during the day. However, a person in transit between two points outside of Minnesota who is physically present in Minnesota less than 24 hours will not be treated as present in Minnesota during transit."

## Pertinent Portion of Text of Jan. 3, 1996, Letter Written by John Haugen, Representing Minnesota Department of Revenue, to Northwest Airlines' Counsel In Re Taxability of Flight Instructors

"Pursuant to your letter of September 29, 1995, and our meeting in December of 1995 concerning Minnesota individual income taxation of nonresident pilots of Northwest Airlines who perform service in Minnesota as flight instructors, it is the Department of Revenue's position that the pilots would be under the protection of 49 USC 40116(f) and would not be subject to Minnesota individual income on their pay from Northwest Airlines for a given month, if at least once during the given month, the pilot files a plane or does inflight evaluations for Northwest Airlines either as part of the flight training, on a reserve pilot basis, or a regularly assigned flight.

For calendar months after February of 1996, Minnesota will take the position the nonresidential pilots who provide services as flight trainers in Minnesota and do not meet the above one flight per month criterion will be subject to Minnesota individual income tax on the pay from Northwest Airlines for that month.

For calendar months before March of 1996, the Department will consider all pilots who had duties in Minnesota as a flight trainer, to be covered under the federal provision regardless of whether they met the one flight per month ruling; and thus will not be subject to Minnesota tax on their pay if they were a non-resident.... "